Supreme Court, U.S.
FILED
SEP 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-114

In the Supreme Court of the United States

OCTOBER TERM 1986

MELISSA JOHNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the United States is liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, for a sexual assault committed by a letter carrier employed by the United States Postal Service. This contention is without merit, for the FTCA preserves sovereign immunity for "[a]ny claim arising out of assault [or] battery" by a federal employee other than an "investigative or law enforcement officer." 28 U.S.C. 2680(h).[1]

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[1]An issue similar to that presented here is raised in the petition for a writ of certiorari filed in *Metz* v. *United States*, No. 86-189 (filed Aug. 5, 1986), an FTCA action for invasion of privacy and intentional infliction of emotional distress allegedly resulting from the arrest and detention of the plaintiff.

1. In June 1982 a mailman sexually assaulted five-year-old Melissa Johnson.[2] After the Postal Service denied their administrative claim, petitioners (Melissa and her mother) filed this action seeking damages from the United States. Petitioners contend that the Postal Service negligently employed and supervised the mailman (Pet. App. A44-A45). The United States moved to dismiss for lack of subject matter jurisdiction, asserting that it had not waived sovereign immunity for causes of action "arising out of" assault or battery. 28 U.S.C. 2680(h).

The district court dismissed on the ground that the claim raised by the complaint had not been submitted to the Postal Service as required by 28 U.S.C. 2675(a). The court pointed out that petitioners' administrative claim did not mention facts "even hinting of negligent supervision," or that anyone other than the mailman "might be culpable for the[] injuries" (Pet. App. A33). The court therefore held that petitioners had "failed to comply with the presentment requirement of Section 2675(a)" (*id.* at A35).

The court of appeals, contrary to the district court, held that the administrative claim was sufficient to put the Postal Service on notice of the negligent supervision claim (Pet. App. A5-A9). However, the court of appeals affirmed the dismissal on the ground that the district court lacked jurisdiction because the government had not waived sovereign immunity with respect to claims arising out of assault and battery. The court agreed with Chief Justice Burger and three other Justices who concluded in *United States* v. *Shearer*, No. 84-194 (June 27, 1985), that a plaintiff " 'cannot avoid the reach of § 2680(h) by framing her complaint

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[2]Postal Service files show that the mailman entered a plea of guilty in New York State court to sexual abuse in the first degree and was sentenced to a term of imprisonment of one to three years.

in terms of negligent failure to prevent the assault and battery' " (Pet. App. A10 (quoting *Shearer*, slip op. 2-3)).[3] The court of appeals here concluded that "the plain language of § 2680(h) prohibits claimants from clothing assault and battery actions in the garb of negligence by claiming negligent failure to prevent the attack" (Pet. App. A10).[4]

2. For the reasons stated by Chief Justice Burger in *Shearer*, the court of appeals' decision is correct. "Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery" (slip op. 3 (emphasis in original)). In this case, as in *Shearer*, "[n]o semantical recasting of events can alter the fact that the battery was the immediate cause of [the damage] and, consequently, the basis of [the] claim" (*id.* at 2). See also *Kosak* v. *United States*, 465 U.S. 848 (1984) (28 U.S.C. 2680(c) exception for claims arising in respect of detention of goods extends to claims for destruction during detention); *Block* v. *Neal*, 460 U.S. 289, 297 (1983) (28 U.S.C. 2680(h) exception for claims arising out of misrepresentation does not bar claims for negligent supervision of construction of home where "the Government's misstatements are not essential to plaintiff's negligence claim").

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[3]Four Justices did not join the portion of Chief Justice Burger's opinion in *Shearer* addressing Section 2680(h), and the remaining Justice did not participate in the decision. The Court held in *Shearer* that the plaintiff's claim was barred by the *Feres* doctrine, which provides that service members may not recover under the FTCA for injuries incurred incident to military service.

[4]Judge Pratt dissented. He would have held that "a proper interpretation of the FTCA, consistent with its broad and remedial purpose, would be to hold the government liable, as would be a private person, when its supervisors negligently hire an assaultive employee, assign him to an area of temptation, and negligently fail to foresee and prevent the harm he is likely to inflict on the public" (Pet. App. A22).

As we explained in our petition in *Shearer* (at 7-9),[5] the Third Circuit's decision in that case (723 F.2d 1102 (1983))—that a plaintiff may bring a suit alleging negligent failure to supervise a government employee who committed an intentional tort—was inconsistent with the decisions of every other court of appeals that had considered the issue. Since this Court's decision in *Shearer*, the Fifth and Sixth Circuits, like the court below, have concluded that Section 2680(h) bars claims alleging negligent failure to supervise a government employee. *Garcia* v. *United States*, 776 F.2d 116 (5th Cir. 1985); *Satterfield* v. *United States*, 788 F.2d 395, 399-400 (6th Cir. 1986).[6] No court, other than the Third Circuit in its decision in *Shearer* (which this Court reversed on other grounds), has reached a contrary conclusion.[7] Accordingly, there is no warrant for review by this Court.

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[5]We are serving a copy of each of our briefs in *Shearer* upon counsel for petitioner.

[6]In addition, the Second Circuit recently followed its decision in this case in *Miele* v. *United States*, No. 85-6403 (Sept. 3, 1986).

[7]The only court of appeals decisions petitioners cite (Pet. 9) in support of their claim other than the Third Circuit's decision in *Shearer*—*Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972), and *Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1966)—are clearly distinguishable. As we explained in our petition in *Shearer* (at 12-13 n.6) and our reply brief at the petition stage (at 1-2), those cases rest on the principle that when the government undertakes a special responsibility for protecting the public from a person known to be dangerous, such as the juvenile delinquent in *Gibson* or the dangerous mental hospital patient in *Underwood*, it must exercise due care in discharging that responsibility. No such special responsibility was undertaken here. Moreover, the Fifth Circuit "retreat[ed] from *Underwood*" in its recent decision in *Garcia* in light of Chief Justice Burger's opinion in *Shearer* (776 F.2d at 118).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986